

BEFORE THE POLICE BOARD OF THE CITY OF CHICAGO

IN THE MATTER OF CHARGES FILED AGAINST) POLICE OFFICER DANIEL LOMBARD,) STAR No. 10022, DEPARTMENT OF POLICE,) CITY OF CHICAGO,) RESPONDENT.))	No. 12 PB 2795 (CR No. 1006073)
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FINDINGS AND DECISION

On May 29, 2012, the Superintendent of Police filed with the Police Board of the City of Chicago charges against Police Officer Daniel Lombard, Star No. 10022 (hereinafter sometimes referred to as “Respondent”), recommending that the Respondent be discharged from the Chicago Police Department for violating the following Rules of Conduct:

- Rule 2: Any action or conduct which impedes the Department’s efforts to achieve its policy and goals or brings discredit upon the Department.

- Rule 8: Disrespect to or maltreatment of any person, while on or off duty.

The Police Board caused a hearing on these charges against the Respondent to be had before Thomas E. Johnson, Hearing Officer of the Police Board, on August 8, 9, and 14, 2012.

Following the hearing, the members of the Police Board read and reviewed the record of proceedings and viewed the video-recording of the testimony of the witnesses. Hearing Officer Johnson made an oral report to and conferred with the Police Board before it rendered its findings and decision.

POLICE BOARD FINDINGS

The Police Board of the City of Chicago, as a result of its hearing on the charges, finds and determines that:

1. The Respondent was at all times mentioned herein employed as a police officer by the Department of Police of the City of Chicago.

2. The written charges, and a Notice stating when and where a hearing on the charges was to be held, were served upon the Respondent more than five (5) days prior to the hearing on the charges.

3. Throughout the hearing on the charges the Respondent appeared in person and was represented by legal counsel.

4. The Respondent filed a Motion to Dismiss, requesting that the charges filed against him be stricken and the case dismissed for the following reasons: (a) the failure to bring timely charges violates the five-year statute of limitations established by 65 ILCS 5/10-1-18.1; (b) Section 8.4 of the Agreement between the Fraternal Order of Police Lodge 7 and the City of Chicago (“Collective Bargaining Agreement”) required that the Respondent’s file be destroyed; (c) the failure to bring timely charges violates the due process rights of the Respondent; (d) the charges should be barred by laches; (e) the investigation by the Independent Police Review Authority (IPRA) failed to follow Chicago Police Department General Orders; and (f) the IPRA investigation violated Section 2-57-070 of the Municipal Code of Chicago. The Respondent’s Motion to Dismiss is **denied** for the reasons set forth below.

a. Statute of Limitations. The Respondent argues that this case is time-barred under 65 ILCS 5/10-1-18.1 (“Statute of Limitations”), which states in relevant part:

Upon the filing of charges for which removal or discharge, or suspension of more than 30 days is recommended a hearing before the Police Board shall be held. If the charge is based upon an allegation of the use of unreasonable force by a police officer, the charge must be brought within 5 years after the commission of the act upon which the charge is based. The statute of limitations established in this Section 10-1-18.1 shall apply only to acts of unreasonable force occurring on or after the effective date of this amendatory Act of 1992.

There is no dispute that: (1) the commission of the acts upon which the charges are based occurred on May 28, 2007; (2) that May 28, 2012, was a holiday (Memorial Day); and (3) that the charges against the Respondent were filed on May 29, 2012. Section 1.11 of the Statute on Statutes (5 ILCS 70/1.11) states:

The time within which any act provided by law is to be done shall be computed by excluding the first day and including the last, unless the last day is Saturday or Sunday or is a holiday as defined or fixed in any statute now or hereafter in force in this State, and then it shall also be excluded. If the day succeeding such Saturday, Sunday or holiday is also a holiday or a Saturday or Sunday then such succeeding day shall also be excluded.

Based on the above facts and the Statute on Statutes, the Board determines that the charges against the Respondent were filed within the time provided by the Statute of Limitations. Consequently, it is not necessary for the Board to reach the question of whether the charges filed against the Respondent were “based upon an allegation of the use of unreasonable force by a police officer.”

b. Section 8.4 of the Collective Bargaining Agreement (“CBA”). Section 8.4 of the CBA states in relevant part:

All disciplinary investigation files, disciplinary history card entries, Independent Police Review Authority and Internal Affairs Division disciplinary records, and any other disciplinary record or summary of such record other than records relating to Police Board cases, will be destroyed five (5) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, except that not sustained files alleging criminal conduct or excessive force shall be retained for a period of seven (7) years after the date of the incident or the date upon which the violation is discovered, whichever is longer, and thereafter, cannot be used against the officer in any future proceedings in any other forum, except as specified below, unless the investigation relates to a matter which has been subject

to either civil or criminal court litigation or arbitration prior to the expiration of the five- (5-) year period. In such instances, the Complaint Register case files normally will be destroyed immediately after the date of the final arbitration award or the final adjudication, unless a pattern of sustained infractions exists.

The Respondent argues that the investigation file and records pertaining to the incident in question should have been destroyed prior to the charges being filed against the Respondent, and therefore the use of this material to bring charges was unlawful and, consequently, the charges should be dismissed.

The Respondent's reading of Section 8.4 of the CBA is incorrect. Section 8.4 does not bring to a halt an open on-going investigation of a disciplinary matter that ultimately becomes a Police Board case, nor does Section 8.4 regulate the amount of time allowed for the filing of charges with the Police Board. Rather, Section 8.4 governs the use in future proceedings of material and records of a disciplinary matter that has been concluded and closed.

In addition, applying Section 8.4 in the way the Respondent argues would regulate the amount of time allowed for the filing of any charge with the Police Board, including a charge based upon an allegation of the use of unreasonable force by a police officer. However, applying Section 8.4 in this way is prohibited by the state statute that establishes the Statute of Limitations discussed above, for this statute contains a home rule preemption (65 ILCS 5/10-1-18.2):

No municipality, including a municipality that is a home rule unit, may regulate the period of time or establish or enforce a statute of limitations relating to charges brought against a police officer before a Police Board, Civil Service Commission, or other board or officer empowered by law or ordinance to investigate police misconduct if the charge is based upon an allegation of the use of unreasonable force by a police officer. The statute of limitations established in Sections 10-1-18 and 10-1-18.1 for those charges are an exclusive exercise of powers and functions by the State under paragraph (h) of Section 6 of Article VII of the Illinois Constitution.

c. Due Process. Citing *Morgan v. Department of Financial and Professional Regulation*, 374 Ill.App.3d 275, 871 NE2d 178 (1st Dist 2007), and *Lyon v. Department of Children and Family Services*, 209 Ill.2d 264 (2004), the Respondent claims that the Constitution precludes such a lengthy delay in the investigation of the Respondent's alleged misconduct. *Morgan* and *Lyon*, however, involved a delay in *adjudication* of allegations of misconduct after the respective plaintiffs had been suspended from their jobs—not delay in the *investigation* leading to the initial suspensions. *Morgan* involved a clinical psychologist accused of sexually abusing a patient, where the state took fifteen months to decide the case after the suspension. *Lyon* involved a teacher accused of abusing students where the director of DCFS failed to honor specific regulatory time limits for decision-making.

The Respondent's case before the Police Board is different from *Morgan* and *Lyon*, as the Respondent in his Motion is complaining about the delay from the time of the incident to the bringing of charges, not the time it took to try him once the charges were filed and he was suspended without pay. This difference is important because the due-process analysis in *Morgan* and *Lyon* is triggered by the state's decision to deprive the psychologist and teacher of their jobs, thus preventing them from working for prolonged periods of time before they were accorded the opportunity to have a hearing and decision to clear their name. Here, the Respondent was working and was being paid his full salary and benefits during the entire period of the investigation and up to the filing of charges with the Police Board. The Due Process clause precludes a state or local government from "depriving any person of life, liberty or property [i.e. a public job] without due process of law." Here, the Respondent was not suspended without pay from his job until *after* the charges against him were filed. Therefore, the Respondent was *not*

deprived of his job prior to the filing of charges, and any delay in bringing the charges is therefore *not* a violation of the Respondent's due process rights.

We recognize that the Circuit Court of Cook County, in *Orsa v. City of Chicago Police Board*, 11 CH 08166 (March 1, 2012) found that the protections of the Due Process clause are triggered by an unreasonable delay in the investigation of a matter, even if the officer retains his job, salary and benefits during the investigation. The Court cited *Stull v. Department of Children and Family Services*, 239 Ill.App.3d 325 (5th Dist. 1992). *Stull* involved a teacher accused of sexually abusing two of his students. The statute and regulations governing DCFS investigations of child abuse provided strict time limits on the length of any investigation and on the time within which a hearing must be conducted and a decision entered if the adult found to have abused children sought a hearing. The *Stull* court found that DCFS had grossly violated these time limits and required expungement of the adverse finding against the teacher, even though the administrative appeal found that he had been properly "indicated" as an abuser. The *Stull* court did find that the teacher's due process rights had been infringed, but it was not because of a delay in DCFS's investigation of the case. The court held that due process was violated by the more than one-year delay in adjudicating the teacher's appeal because during that period of time there was an indicated finding of child abuse lodged against the teacher and this finding prohibited him from working, *see* 239 Ill.App.3d at 335, thus triggering the kind of deprivation that is not present in the Respondent's case. *Cavaretta v. Department of Children and Family Services*, 277 Ill.App.3d 16 (2nd Dist. 1996), also cited by the Circuit Court, is identical to *Stull*, which it relies upon. The *Cavaretta* court was quite careful to find that due process was not implicated until DCFS (after its investigation was complete) "indicated" the teacher as a child abuser and placed

the teacher's name in the state's central registry, which directly deprived the teacher of the ability to work.¹

d. Laches. The Respondent argues that the doctrine of laches should apply here in supporting the dismissal of charges, for he argues that the delay in bringing the charges against him resulted in prejudice to him in losing his employment and in hampering his ability to locate witnesses and counter evidence years after the fact to defend against the charges.

Laches is an equitable doctrine that is used to prevent a party in litigation from enforcing a right it otherwise has because it has not been diligent in asserting this right and the opposing party has been prejudiced by the delay. Private parties and public agencies are not on an equal footing when it comes to the application of the laches doctrine. Many cases, including *Van Milligan v Board of Fire and Police Commissioners of the Village of Glenview*, 158 Ill.2d 85, 630 NE2d 830 (1994), hold that laches can only be invoked against a municipality under "compelling" or "extraordinary" circumstances. In addition, the party that invokes the doctrine of laches has the burden of pleading and proving the delay and the prejudice. *Hannigan v. Hoffmeister*, 240 Ill. App. 3d 1065, 1074 (1st Dist. 1992). Under Illinois law, the Respondent must demonstrate that the Superintendent's unreasonable delay caused material prejudice to the Respondent; the Respondent must submit evidence in support of his claims of prejudice (for example, testimony that witnesses could no longer recall what happened, or affidavits stating that records had been lost or destroyed during the intervening years). *Nature Conservancy v. Wilder*, 656 F.3d. 646 (7th Cir. 2011).

¹ The Circuit Court also cited *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), but only in general terms. There was no issue in *Loudermill* that a deprivation, for due process purposes, had occurred as it involved the discharge of school district employees.

The Respondent has made no specific showing of any prejudice that resulted from a delay in bringing charges before the Police Board. He argues that had the charges been brought in a timely manner, he would have been able to locate witnesses who could have been favorable to his defense, as well as witnesses whose memories had not faded with the passage of time. The Respondent made no showing that he attempted to locate such witnesses or evidence but was unable to do so because of the passage of time. Consequently, any argument that there may be other witnesses out there, or that material evidence was overlooked and is now unavailable, is speculative.

The Respondent here has not demonstrated any “compelling” or “extraordinary” circumstances warranting a dismissal of his case, and has not carried the burden of proving that he was prejudiced by a delay in the bringing of charges.

e. General Order 93-03. The Respondent argues that the Police Department’s own General Order requires a prompt and thorough investigation, and that the Department failed to fully comply with the provisions of this General Order.

In fact, the General Order does not set an absolute deadline within which investigations must be completed, but provides that if they last more than 30 days, the investigator must seek and obtain an extension of time within which to complete the investigation. Here, there is no evidence that the investigator failed to regularly seek, and was granted, extensions of time, in compliance with the General Order.

Once the investigator completed the process of gathering evidence, the matter is reviewed at several levels to ensure that a thorough investigation was conducted, as required by the General Order.

There was no substantial violation of the General Order in this case. Even if, however, the General Order was violated, there is no provision in the General Order requiring the extraordinary remedy of dismissal of the case as a sanction for such a violation. The Board declines to extend the reach of the General Order in this manner.

f. Municipal Code Section 2-57-070. The Code provides that if the Chief Administrator of the Independent Police Review Authority (IPRA) does not conclude an investigation within six months after its initiation, the Chief Administrator shall notify the Mayor, the City Council, the complainant, and the accused officer. The Respondent argues that IPRA did not comply with this provision of the Code.

This provision of the Code took effect in September 2007, and does not contain any language making it retroactive. The investigation of the allegations against the Respondent was initiated in May 2007, and the six-month point of the investigation occurred in November 2007. It appears that IPRA did not notify the Respondent. However, even if this provision was applicable to the Respondent and was violated, neither Section 2-57-070 nor anything else in the Code states that dismissal of a Police Board case is the sanction for failing to make the report to the Mayor, the City Council, the officer, and the complainant. It is unpersuasive that such an extreme sanction would automatically follow, particularly where the alleged misconduct under investigation is as serious as it is here. Without any basis or cited authority, and none is given by the Respondent, there is no basis for the Board to dismiss the charges pursuant to Section 2-57-070, and the Board declines to extend the reach of the ordinance in this manner.

5. The Respondent, Police Officer Daniel Lombard, Star No. 10022, charged herein, is **guilty** of violating, to wit:

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department,

in that:

On or about May 28, 2007, at approximately 0419 hours, at 3000 West Fletcher Street, Chicago, Officer Lombard impeded the Department's efforts to achieve its policy and/or brought discredit upon the Department when, after being involved in a traffic accident, he kicked Norberto Torres on the thigh and/or in the groin area, and/or grabbed Mr. Torres by the hair, and/or struck Mr. Torres's head/face against his vehicle. (The Superintendent did not prove by a preponderance of the evidence that Officer Lombard urinated in public view, or that Officer Lombard impeded the Department's efforts to achieve its policy and/or brought discredit upon the Department when he moved Mr. Torres's vehicle.)

The Board finds that the testimony of Norberto Torres was very credible. After the accident, Mr. Torres testified that he exited his vehicle in order to check on the condition of Officers Lombard and Westbrook, and did not attempt to flee the scene. He made an attempt to call his sister until Officer Lombard took his phone away. Mr. Torres says that he was then handcuffed and, while in handcuffs, Officer Lombard kicked him twice and then smashed his head on the roof of his vehicle. Mr. Torres's testimony is corroborated by pictures of his head, as well as the credible testimony of Alejandro Gutierrez, who observed the incident from the window of his apartment. Not only did Mr. Gutierrez confirm that Mr. Torres was not trying to resist or flee, but he also supported Mr. Torres's testimony that Officer Lombard kned or kicked him and then slammed Mr. Torres's head against his car. Mr. Gutierrez's testimony is particularly convincing as he contemporaneously made two calls to 911 in which he described the beating as it was going on. Another eyewitness, Arnold Garcia, also observed the incident from his apartment window. He too confirms that Mr. Torres did not attempt to flee or resist, but

nonetheless Officer Lombard smashed his head onto his car while handcuffed. While there are some inconsistencies as between these witnesses' testimony, *e.g.* on whether Officer Westbrook was also involved in the beating, the Board finds that their testimony is, taken as a whole, consistent. The Board further finds it unlikely that these unrelated, civilian witnesses would fabricate this kind of detailed testimony.

The Board rejects Officer Lombard's testimony that Mr. Torres panicked and tried to flee through the passenger side door of his vehicle, as Officer Lombard's vehicle had smashed into the passenger side of Mr. Torres's vehicle, so that there would have been no escape path for Mr. Torres through the passenger side door or window of his car. Officer Lombard also testified that he had to use force to pull Mr. Torres out of his vehicle and control him once he was out of the vehicle. The officer suggests that this rough but proper treatment of Mr. Torres may have been misinterpreted by citizens. The Board, however, rejects this testimony, as all of the civilian eyewitnesses say that Mr. Torres was assaulted after he was already restrained in handcuffs. The witnesses do not contend that they saw rough treatment of Mr. Torres while he was being pulled out of the car or before he was in the handcuffs. Finally, Officer Lombard's testimony that Mr. Torres had no visible injuries, which was joined by Sergeant Fox, and Officers Reyno and Westbrook, is not credible, given the photographic evidence of Mr. Torres' injuries.

The Board does not find that Officer Lombard urinated at the scene, as the evidence on this point did not identify which officer (Lombard or Westbrook) urinated, and therefore the evidence fails to discharge the Superintendent's burden. Nor does the Board find that Officer Lombard impeded the Department's efforts to achieve its policy and/or brought discredit upon the Department when he moved the vehicles at the scene out of the way of traffic. There is no

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Department rule that prevents an officer from moving vehicles at a crash scene, provided there are no fatalities.

6. The Respondent, Police Officer Daniel Lombard, Star No. 10022, charged herein, is **guilty** of violating, to wit:

Rule 8: Disrespect to or maltreatment of any person, while on or off duty,
in that:

Count I: On or about May 28, 2007, at approximately 0419 hours, at 3000 West Fletcher Street, Chicago, Officer Lombard, while off duty and after being involved in a traffic accident, kicked Norberto Torres on the thigh and/or in the groin area, thereby engaging in disrespect to or maltreatment of any person, while on or off duty.

See the findings set forth in paragraph no. 5 above, which are incorporated here by reference.

7. The Respondent, Police Officer Daniel Lombard, Star No. 10022, charged herein, is **guilty** of violating, to wit:

Rule 8: Disrespect to or maltreatment of any person, while on or off duty,
in that:

Count II: On or about May 28, 2007, at approximately 0419 hours, at 3000 West Fletcher Street, Chicago, Officer Lombard, while off duty and after being involved in a traffic accident, grabbed Norberto Torres by the hair, thereby engaging in disrespect to or maltreatment of any person, while on or off duty.

See the findings set forth in paragraph no. 5 above, which are incorporated here by reference.

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8. The Respondent, Police Officer Daniel Lombard, Star No. 10022, charged herein, is **guilty** of violating, to wit:

Rule 8: Disrespect to or maltreatment of any person, while on or off duty,
in that:

Count III: On or about May 28, 2007, at approximately 0419 hours, at 3000 West Fletcher Street, Chicago, Officer Lombard, while off duty and after being involved in a traffic accident, struck Norberto Torres's head/face against his vehicle, thereby engaging in disrespect to or maltreatment of any person, while on or off duty.

See the findings set forth in paragraph no. 5 above, which are incorporated here by reference.

9. The Police Board has considered the facts and circumstances of the Respondent's conduct, the evidence presented in defense and mitigation, and the Respondent's complimentary and disciplinary histories, copies of which are attached hereto as Exhibit A.

President Carney, Vice President Davis, and Board Member Miller: Officer Lombard physically maltreated Norberto Torres, and this conduct warrants a severe punishment. Nonetheless, based on Officer Lombard's extensive complimentary record, the lack of any prior disciplinary record, the testimony of the character/mitigation witnesses who supported Officer Lombard's return to duty, Mr. Torres's own wishes that Officer Lombard not lose his job, and the facts of this case, we find that discharging Officer Lombard from the Chicago Police Department is not warranted. We vote to suspend Officer Lombard for one year.

Board Members Conlon, McKeever, and Rodriguez: We reluctantly join President Carney, Vice President Davis, and Board Member Miller in voting to impose a one-year suspension. We would impose a penalty of discharge due to the vicious, unprovoked nature of

the treatment of Mr. Torres by Officer Lombard. However, having failed to achieve a majority vote of the Board for discharge, we join our colleagues in voting for a one-year suspension.

POLICE BOARD DECISION

The Police Board of the City of Chicago, having read and reviewed the record of proceedings in this case, having viewed the video-recording of the testimony of the witnesses, having received the oral report of the Hearing Officer, and having conferred with the Hearing Officer on the credibility of the witnesses and the evidence, hereby adopts the findings set forth herein by the following votes.

By a unanimous vote, the Board finds the Respondent not guilty of the parts of the Rule 2 charge pertaining to urinating in public view and moving Norberto Torres's vehicle.

By a unanimous vote, the Board finds the Respondent guilty of the parts of the Rule 2 charge pertaining to kicking Norberto Torres on the thigh and/or in the groin area, grabbing Mr. Torres by the hair, and striking Mr. Torres's head/face against his vehicle.

By a unanimous vote, the Board finds the Respondent guilty of all counts of the Rule 8 charge.

As a result of the foregoing, the Police Board, by a vote of 6 (Carney, Davis, Conlon, McKeever, Miller, Rodriguez) to 3 (Ballate, Foreman, Fry), hereby determines that cause exists for suspending the Respondent from his position as a police officer with the Department of Police, and from the services of the City of Chicago, for a period of one (1) year, from June 1, 2012, to and including May 31, 2013.

NOW THEREFORE, IT IS HEREBY ORDERED that the Respondent, Police Officer Daniel Lombard, Star No. 10022, as a result of having been found **guilty** of charges in Police Board Case No. 12 PB 2795, be and hereby is **suspended** from his position as a police officer with the Department of Police, and from the services of the City of Chicago, for a period from June 1, 2012, to and including May 31, 2013 (one year).

DATED AT CHICAGO, COUNTY OF COOK, STATE OF ILLINOIS, THIS 20th DAY OF SEPTEMBER, 2012.

/s/ Demetrius E. Carney

/s/ Scott J. Davis

/s/ William F. Conlon

/s/ Susan L. McKeever

/s/ Johnny L. Miller

/s/ Elisa Rodriguez

Attested by:

/s/ Max A. Caproni
Executive Director
Police Board

DISSENT

We concur with the majority's findings regarding the Respondent's guilt. However, based on Officer Lombard's years of distinguished service with the Police Department, his extensive complimentary record, and the lack of any prior disciplinary record, we find that a suspension of six months is the appropriate penalty on the facts of this particular case.

/s/ Melissa M. Ballate

/s/ Ghian Foreman

/s/ Rita A. Fry

RECEIVED A COPY OF

THE FOREGOING COMMUNICATION

THIS ____ DAY OF _____, 2012.

SUPERINTENDENT OF POLICE

Chicago Police Department Personnel Division

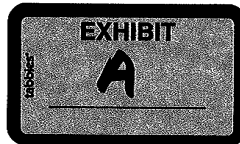
**Only for active personnel*

Complimentary History

Name	Title	Star	Unit	Detail Unit	Emp Number
LOMBARD, DANIEL J	9161	10022	313		

Achievements

UNIT MERITORIOUS PERFORMANCE AWARD	1
HONORABLE MENTION	84
ATTENDANCE RECOGNITION AWARD	2
PROBLEM SOLVING AWARD	1
OTHER AWARDS	2
DEPARTMENT COMMENDATION	2
JOINT OPERATIONS AWARD	1
2009 CRIME REDUCTION AWARD	1
PRESIDENTIAL ELECTION DEPLOYMENT AWARD 2008	1
COMPLIMENTARY LETTER	5
DEPLOYMENT OPERATIONS CENTER AWARD	1
2004 CRIME REDUCTION RIBBON	1
EMBLEM OF RECOGNITION - PHYSICAL FITNESS	4
TOTAL AWARDS	106



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IADRI18

CHICAGO POLICE DEPARTMENT

Sustained Complaints History Report

25-MAY-2012 10:00:32 AM
 UPDATED HISTORY

<u>Social Sec. #</u>	<u>Name</u>	<u>Star #.</u>	<u>Emp. #</u>	<u>Rank</u>	<u>Description</u>	<u>Unit</u>
[REDACTED]	LOMBARD DANIEL J.	10022	[REDACTED]	9161	POLICE OFFICER	313
<u>Sex</u>	<u>Birth Date</u>	<u>No. Of CR's</u>	<u>No. Of SPAR's</u>			
M	[REDACTED]	0	0			
<u>Race</u>						
WHITE						
	<u>Appointed Date</u>					
	25-JUN-2001					

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